

SENATE RECORD VOTE ANALYSIS

105th Congress
2nd Session

Vote No. 23

March 6, 1998, 11:00 am
Page S-1496 Temp. Record

HIGHWAY REAUTHORIZATION (ISTEA)/Race-Gender Neutral Assistance

SUBJECT: Intermodal Surface Transportation Efficiency Act of 1997 . . . S. 1173. Chafee motion to table the McConnell amendment No. 1708.

ACTION: MOTION TO TABLE AGREED TO, 58-37

SYNOPSIS: As reported, S. 1173, the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1997, will reauthorize for 6 years the Federal-aid highway, highway safety, and other surface transportation programs. A total of \$145 billion will be authorized, which represents a 20-percent nominal and 5-percent real increase over the previous 6-year authorization. (Due to a filibuster, S. 1171 was returned to the calendar last year, and Congress passed S. 1519 to provide a 6-month extension of the highway bill instead.)

The committee modified substitute amendment would make changes to correct certain technical violations of the Budget Act. (Initially, the bill had been reported with technical amendments; when the bill was under consideration last year (see 105th Congress, 1st session, vote Nos. 271-272, 275, 277-278, and 282), those amendments were consolidated by unanimous consent into a single perfecting amendment. When the Senate resumed debate on the bill this year, the amendment was modified to be a substitute amendment, and other pending amendments that filled parliamentary openings for offering amendments were withdrawn.)

The McConnell amendment would eliminate the Disadvantaged Business Enterprise (DBE) program and would create in lieu thereof a race- and gender-neutral program, the Emerging Business Enterprise (EBE) program, to help small and new businesses win transportation contracts based on merit and price. Details on the DBE program and the EBE program are provided below.

The DBE program was signed into law in 1983 as part of the highway bill that was enacted that year. The program provides that, except to the extent that the Secretary of Transportation determines otherwise, no less than 10 percent of Federal highway funds "shall be expended with small business concerns controlled by socially and economically disadvantaged individuals." Since its inception, approximately 13 percent to 16 percent of highway funds have been expended on DBEs; almost all of that spending has been on subcontracts. The Department of Transportation asks for bids on primary contracts, and sets subcontracting goals for DBEs

(See other side)

YEAS (58)			NAYS (37)			NOT VOTING (5)	
Republicans (15 or 29%)	Democrats (43 or 98%)		Republicans (36 or 71%)	Democrats (1 or 2%)		Republicans (4)	Democrats (1)
Bond	Akaka	Kennedy	Abraham	Hatch	Hollings	Bennett ⁻²	Glenn ⁻²
Campbell	Baucus	Kerrey	Allard	Hutchinson		Coats ⁻²	
Chafee	Biden	Kerry	Ashcroft	Inhofe		Helms ⁻²	
Collins	Bingaman	Kohl	Brownback	Kyl		Hutchison ⁻²	
D'Amato	Boxer	Landrieu	Burns	Lott			
Domenici	Breaux	Lautenberg	Cochran	Lugar			
Jeffords	Bryan	Leahy	Coverdell	Mack			
Kempthorne	Bumpers	Levin	Craig	McConnell			
McCain	Byrd	Lieberman	DeWine	Nickles			
Murkowski	Cleland	Mikulski	Enzi	Roberts			
Roth	Conrad	Moseley-Braun	Faircloth	Santorum			
Snowe	Daschle	Moynihan	Frist	Sessions			
Specter	Dodd	Murray	Gorton	Shelby			
Stevens	Dorgan	Reed	Gramm	Smith, Bob			
Warner	Durbin	Reid	Grams	Smith, Gordon			
	Feingold	Robb	Grassley	Thomas			
	Feinstein	Rockefeller	Gregg	Thompson			
	Ford	Sarbanes	Hagel	Thurmond			
	Graham	Torricelli					
	Harkin	Wellstone					
	Inouye	Wyden					
	Johnson						

EXPLANATION OF ABSENCE:

- 1—Official Business
- 2—Necessarily Absent
- 3—Illness
- 4—Other

SYMBOLS:

- AY—Announced Yea
- AN—Announced Nay
- PY—Paired Yea
- PN—Paired Nay

on those contracts. Primary contractors win bids in part on the percentage of the contract that they agree they will subcontract to DBEs. By Federal and State laws, primary contractors are generally required to perform more than 50 percent of the work themselves. Most subcontracting work is for non-capital intensive jobs, such as landscaping or traffic control. Roughly half of all subcontracts go to DBEs. The program uses the Small Business Act's statutory definition for the term "socially and economically disadvantaged individuals." That definition presumes that "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities or any other individual found to be disadvantaged by the administration" is disadvantaged. In 1987, when the highway bill was reauthorized, Congress added the presumption that all women are socially and economically disadvantaged. Since that addition, the amount awarded to women has increased substantially. In 1997, nearly 50 percent of the funds went to non-minority women (minority women are counted in the minority category rather than the women category, though the number of minority women-owned DBEs is statistically insignificant). Since women were added statutorily to the definition, the total contract dollar awards to minority-owned businesses has declined substantially; most of the decline is in contracts to businesses owned by African Americans (such DBEs received \$522 million in contracts in 1986, but only \$262 million in 1996). Non-minority and non-women contractors may attempt to demonstrate that they are socially and economically disadvantaged, and thereby receive DBE status. Generally, when a firm's average gross receipts over a 3-year period exceed a certain level (currently \$16.6 million), they "graduate" and lose their DBE status. No time limit exists for DBE status. In a 4-year survey (1988-1992), the General Accounting Office (GAO) found that fewer than 1 percent of DBE firms graduated. Federal highway contracts go to minority- and women-owned firms that are not DBEs, though no tracking of those firms is done (or has ever been done), so no estimate of the total amount of Federal highway funds that go to minority- or women-owned businesses is available. The estimate from 1978 that 1.9 percent of Federal contracts went to minority- and women-owned businesses is a tabulation of the amount of contract dollars that went to such businesses under the race and gender programs that the Department of Transportation had at that time. Little tracking of the costs of the program has been done. A 1986 Federal Highway Administration (FHA) study found approximately a .65 percent increase in total highway contract costs; on this bill, that translates into a 6-year higher cost of \$1.1 billion. The FHA study also found that when administrative costs were considered, the DBE program cost 15 cents for each additional dollar of DBE spending. However, the Transportation Department contends that the DBE program does not result in an overall cost increase. Each State is required to negotiate its annual level for DBE contracting. The Transportation Department decides if a level is acceptable. If a level is not reached, the Department can take disciplinary action, including the withholding of part or all of a State's highway funds. The Department can also withhold funds from a local government based on failure to meet a negotiated level of contracting. The DBE program has a training component to help minority- and women-owned businesses gain the skills needed to compete outside of the program, but in 1994 the GAO concluded that this \$7 million component was absent in some States and small and ineffective elsewhere. In 1995, in *Adarand Constructors Inc. v. Peña*, the Supreme Court ruled that the DBE program could only be found constitutional if it met a "strict scrutiny" test, under which it would have to be found that the program served a compelling governmental interest and was narrowly tailored to further that interest. It remanded the case to the district court, which ruled that the program met the first part of the test but not the second part.

The proposed EBE program would make it the policy of the United States to provide and to encourage the maximum practicable opportunity for emerging business enterprises (EBEs), including "targeted businesses" (businesses that are in depressed economic areas or that employ people from depressed economic areas) and minority- and women-owned businesses, to compete for Federal highway contracts and subcontracts. Each State would be required to engage in business development and outreach efforts in order to implement this policy, including by making special efforts for targeted businesses and minority- and women-owned businesses. More specifically, each State would be required to conduct annual (or more frequent) surveys of contractors and subcontractors to determine the number and identity of EBEs in its jurisdiction, the standard industrial classifications of those EBEs, and whether those EBEs were targeted, minority-owned, or women-owned businesses. Each State would publish a directory of its findings no less frequently than annually. Each time a State solicited a bid that was funded in whole or part under Federal surface transportation law: it would distribute information on the project in a manner that would reasonably notify DBEs; it would recruit bids from targeted businesses and minority- and women-owned EBEs; and it would designate a location at which EBEs could view project specifications and plans at no cost. Each State would be required to provide regular opportunities for EBEs to meet with other construction companies, equipment dealers, and material suppliers. Each State would be required to provide professional and technical services and assistance with financial matters, risk management, any requirements for insurance, and any requirements for pre-qualification or bonding. Each State would also assist DBEs with general business management, estimating, bidding, and construction means and methods. The Department of Transportation would work with the States to help eliminate any overlap between this program and other Federal programs. No construction contract or subcontract would be awarded based on race, ethnic background, or gender. Each State and the GAO would review the operations and effects of the program.

Debate was limited by unanimous consent. After debate, Senator Chafee moved to table the amendment. Generally, those favoring the motion to table opposed the amendment; those opposing the motion to table favored the amendment.

MARCH 6, 1998

VOTE NO. 23

Those favoring the motion to table contended:

Argument 1:

The DBE program is constitutional, it is needed, it is fair, and it works. We realize that one judge has found the program to be unconstitutional, but that decision is controversial and it is on appeal. Except in that judge's district, it is fully constitutional to continue the program without change. Further, the Department of Transportation is revising its regulations to meet that judge's concerns. Once those new regulations are in place, the program will be constitutional regardless of the outcome of the appeal. The judge who ruled that the program is unconstitutional did not dispute that it addressed a real need. Racism and sexism pervade the construction industry. Some of it is overt; some of it is due to the fact that the industry runs on an "old boys" network. For reasons having nothing to do with merit or price, minority- and women-owned businesses are denied construction contracts. Though our colleagues have portrayed the program as a quota program, it is really just a goal program that is open to any new construction business trying to get started. States decide what their targets are for minority and women contracting, and if they fail to meet their targets there are not any consequences. Most importantly, the program works. As a result of the DBE program, new opportunities have opened up for women and minorities. If it is eliminated, the same thing will happen as has happened when State and local governments have gotten rid of their affirmative action programs--the opportunities will disappear. We cannot support that result.

When the Supreme Court conducted its *Adarand* review, it only decided how the constitutionality of the program should be judged. It did not declare the program unconstitutional, as some Senators have implied. Instead, it said that the program could only pass constitutional scrutiny if it met a compelling governmental interest and was narrowly tailored to meet that interest. It did not view this "strict scrutiny" test as being impossible to meet. In the majority opinion in *Adarand*, Justice O'Connor wrote: "We wish to dispel the notion that strict scrutiny is strict in theory but fatal in fact." The Supreme Court then remanded the case, and a district judge ruled the first part of the test was met but that the program was not narrowly tailored enough. Many constitutional scholars have sharply disagreed with that ruling, and it is under appeal. We do not know yet if that judge's decision will be upheld. However, the Department of Transportation has prudently begun work on new regulations to conform to that decision, and those regulations should be promulgated soon. Once those new regulations are in effect, they will apply the statutory language in a constitutional manner, so that language will then be constitutional.

Both statistical and anecdotal evidence prove the continued need for this program. Minorities make up 20 percent of the United States' population, but only 9 percent of construction firms are minority-owned, and they get only 5 percent of all construction business. White-owned construction firms receive 50 times as many loan dollars as African American-owned firms that have identical equity. In 1980, before the DBE program started, they got only 3.6 percent of highway dollars. Since it has existed, they have averaged 13 percent to 15 percent. State and local governments have had similar results when they have started affirmative action programs for State and local highways. In some cases, those programs have been abandoned, by choice or court order, and minority contracting has again plummeted. For instance, when Michigan ended its program, minority contracting fell from 5 percent to 1 percent, and women contracting fell from 9.9 percent to 1.7 percent. Anecdotal evidence shows the prejudice behind these numbers. Black contractors frequently report arriving at job sites to find signs with racial epithets. In California, a female contractor was told that the reason her asbestos-removal business had declined was because "it's back to the good ol' boys club. Haven't you heard affirmative action is out?"

In practice, this program is very fair. Many of us who oppose this amendment oppose quota programs. The DBE program, though, is not a quota program. It only makes a presumption that certain minorities and women are disadvantaged; that presumption can be challenged by a third party. Also, a person who is not a member of a presumed disadvantaged class has the opportunity to prove that he is disadvantaged and thus eligible for DBE status. Further, each State sets its own goal. It does not have to meet that goal. The law sets a goal of 10 percent, but most States pick higher goals for themselves. They like this program because it has worked well for them. If a goal is not reached, nothing happens, which further proves we are not talking about rigid race and gender quotas. In the program's 15-year history, a State has never been punished for not meeting its self-imposed target. In practice, a State usually asks contractors to try to meet a certain minority- and women-subcontracting goal. It awards large contracts based in part on the goal that a contractor says that he or she can meet. Stiff competition among minorities and women for that work then keeps prices down. The program does not have any statistically significant costs.

Our colleagues want us to replace this constitutional, needed, and successful program with a program that will provide business assistance without any goals. Our fear is that the result will be that women and minority-owned businesses will get training but no jobs. We should not take that chance. We urge our colleagues to table the McConnell amendment.

While favoring the motion to table, some Senators expressed the following reservations:

Argument 1:

The arguments against the DBE program are persuasive. However, the fact remains that racism and sexism are pervasive in the construction industry, and the Government should provide remedies. The McConnell amendment's proposed remedies are not

sufficient, because they do not provide any goals. Therefore, we must support the motion to table.

Argument 2:

We are convinced that the proposed new regulations are within the scope of the current statutory language, and that they will turn the DBE program from a quota program into an affirmative action program. In other words, we believe that the new regulations will enforce the statute in a constitutional manner, and will thus make the statute constitutional as well. We will keep a close watch on the Department of Transportation's actions, and if we find that it does not promulgate and enforce the regulations as it has described them to us, we may have to reconsider our position. For now, we will support the motion to table.

Argument 3:

The President feels so strongly that the DBE program should be continued that he would veto the bill if the McConnell amendment were to pass. That veto would be sustained. We oppose this amendment because, as a practical matter, agreeing to it would just kill this bill.

Those opposing the motion to table contended:

The DBE race and gender quota program is unconstitutional, un-American, and ineffective. The McConnell amendment would eliminate it and would substitute a new, constitutional program that would help emerging businesses compete for highway contracts. The *Adarand* case, as well as dozens of other cases, demonstrate that no amount of minor tinkering will make this quota program, that hands out Federal jobs and contracts based on race and gender, constitutional. Further, it is fundamentally wrong to give special treatment to any person based on skin color or gender absent any specific showing of harm to that person. Past discrimination should not be remedied with new, Government-imposed discrimination. In this case, 15 years of experience have also shown that the ends that are sought by this program are not achieved. The goal is not to establish a permanent set-aside for minority- and women-owned businesses on the assumption that they will never be able to compete for and win contracts based on merit and price. The goal instead, is to help emerging businesses that are owned by minorities, women, and others to gain the experience and expertise they need to be able to compete on their own. The DBE program has totally failed to create competitive minority- and women-owned businesses. Such businesses exist and thrive, but not as a result of this program.

All Senators agree that discrimination against construction firms based on the race or gender of their owners is wrong and is illegal. All Senators agree that such discrimination has occurred and, to an extent, still occurs. Most Senators favor affirmative action programs that provide outreach and training to remedy the effects of past and present discrimination. They sharply disagree, though, on whether quota programs are justified, and they sharply disagree on the definition of a quota program. Though Senators disagree, the courts have been consistent. Race-based remedies must meet a strict scrutiny standard. Under that test, they must meet a compelling governmental interest and they must be narrowly tailored. Ruling after ruling has found that this test, in practice, means that they may be employed only to the extent that race-neutral remedies are unavailable, and that they may only be applied on a case-by-case basis to remedy specific cases of discrimination. The Supreme Court has already ruled that the DBE program must be subject to strict scrutiny, and a Federal district court has already ruled that both the statutes and regulations are unconstitutional under that standard. Some of our colleagues and the Administration are hoping that changes in the regulations will save the program; however, regulatory changes cannot fix an unconstitutional statute. Certainly it is true that the Federal Government may succeed in using legal maneuvers to drag the issue through the courts for several more years, but in the end there is no reason to believe that the courts will change their position. We can allow one permutation after another of this unconstitutional program to be drawn up and struck down, and we can allow a patchwork of Federal constitutional law to develop, depending on which versions of quota programs have been held unconstitutional in which districts, or we can act responsibly and follow the clear direction being given to us by the courts. We should get rid of the DBE quota program, and substitute a constitutional affirmative action program of the type supported by nearly all if not all Senators. The McConnell amendment would follow that course.

The courts will always strike down race-based quota programs because they violate the principle that all Americans should be treated equally. In *Adarand*, the Supreme Court found that, "whenever the Government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language of the Constitution's guarantee of equal protection . . . A free people whose institutions are founded upon the doctrine of equality should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications imposed by whatever Federal, State, or local governmental action must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests." Other Supreme Court cases, such as *Bush v. Vera*, *Miller v. Johnson*, *Shaw v. Reno*, and *Richmond v. J.A. Croson Co.* have similarly demanded strict scrutiny, and in each case the program being examined has been struck down. Our colleagues take comfort from the majority statement in the *Adarand* decision that strict scrutiny need not always be fatal in fact, but they ignore the example that follows that statement by way of explanation. That example notes that a racial remedy could

MARCH 6, 1998

VOTE NO. 23

be used to correct a very specific case of "pervasive, systematic, and obstinate" discrimination by a single employer. Thus, the decision in no way implied that the type of broad, official discrimination employed by the DBE program could pass constitutional muster. We asked the Congressional Research Service to compile a list of race-based contracting programs that were struck down under the strict scrutiny test and those that survived; it found a long list of court decisions striking down programs, but could not find a single case of a program being found constitutional.

The Supreme Court remanded the case, and the district court of course found the program unconstitutional. The judge ruled that the statute and regulations were at once both over- and under-inclusive in their racial classifications. The statute's and regulations' stated purpose is to help socially and economically disadvantaged businesses. The statute, and the regulations, then presume that certain people by virtue of their race are disadvantaged, and everyone else is not. As the judge noted, the Sultan of Brunei, until recently the richest man in the world, would be presumed to be disadvantaged under the DBE. Also, though there are more poor whites in America than poor minorities, none of them would be presumed to be disadvantaged. The arbitrariness of the program can be further seen by looking at some of the ancestry classifications (by country) that are currently followed: a Pakistani background gets a disadvantaged classification; an Afghani background does not. Nigerians are disadvantaged; Algerians are not. Chinese and Japanese are disadvantaged; Russians are not.

If the problem is social and economic, the solution should be social and economic, not racial. A racial solution makes the prejudiced assumption that because a business is owned by an African American, a Hispanic person, or an Asian it is disadvantaged and economically failing. That assumption should never be made; it especially should never be made by the Government. Our colleagues have given some examples of discrimination by private businesses against minorities; that discrimination is illegal and should not be tolerated, just as Government discrimination based on race should not be tolerated.

Under the DBE, those groups that are presumed disadvantaged must receive no less than 10 percent of all highway funds. Our colleagues have said that the 10 percent figure is a "goal" because the statute says that the Department of Transportation can adjust it. However, in the *Croson* case, the Supreme Court threw out a nearly identical quota program that had a similar waiver process. Some Senators have noted that on a very few occasions States have failed to meet their "goals" and they have not lost highway funds. They have then suggested that this fact proves that the "goals" are not really quotas. However, this conclusion overlooks several important points. First, States have been ordered by the Federal Government to take remedial actions when they have missed their quotas. Second, the Federal Government has explicit statutory legal authority to withhold every cent of a State's highway allocation if it misses its quota. We remind our colleagues that a couple of days ago, when they proposed a 5-percent loss of highway funds for States that failed to enact certain alcohol-related laws, they were certain that every State would quickly enact those laws rather than risk such a huge loss. The ability to threaten to take away all of a State's highway funds is obviously a much greater threat, so we do not know how our colleagues can call compliance with DBE quotas "voluntary." Third, the Federal Government has withheld funds from local governments that have not met their quotas. Houston, Texas, for instance, was enjoined by a Federal court from using race and gender preferences in its transit program, making it impossible for it to comply with its DBE quota. In retaliation, the Department of Transportation withheld 100 percent of Houston's highway funds for nearly 17 months. Yet another claim our colleagues make is that each State picks its own "goal." If it is up to each State, then, why is each State required to "negotiate" with the Department of Transportation to pick its "goal?" If it is up to each State, why is each "goal" subject to the Department's approval?

We think that many people support this program because they are convinced that, constitutional or not, it works. They believe that it has opened up the construction industry to groups that have been discriminated against, and they believe that eliminating it would result in new discrimination. After looking closely at the operation of the DBE program we have come to exactly the opposite conclusion. The program not only has not prevented discrimination, it has created it and balkanized the industry.

Before a solution to a problem can be proposed, one should make certain that there really is a problem. The DBE program, though, was created on the tautological assumption that "everyone knows" that there is discrimination in Federal highway contracting. However, despite the *Adarand* district court's ruling, none of the fundamental evidentiary requirements necessary to prove a compelling interest for government action has ever been collected. No discrimination has ever been shown by a Federal agency in the award of contracts; no disparity studies have ever been done to see if qualified minority business enterprises are underutilized in Federal highway construction; no studies have ever been done to see if there is any discrimination against minority-owned businesses' bids. In fact, no one knows what percentage of highway funds now go or have ever gone to minority-owned or women-owned businesses. All of the statistics are on disadvantaged business program participants. Minority-owned or women-owned businesses that are not in the DBE program are not counted, nor have they ever been counted. Nevertheless, the DBE program, with its rigid quotas, is premised on the untested assumption that there is discrimination in the award of Federal contracts.

Federal prime contractors must meet rigid requirements before they are allowed to bid on projects. They must have bonding, insurance, capital, and familiarity with Federal laws and regulations on highway construction. They are frequently family-owned businesses, and must put everything they own, including their homes, on the line when they win a bid. DBEs rarely qualify for contracts. Instead, they are hired as subcontractors. As subcontractors, they do not have to meet any of the above requirements.

Prime contractors hire DBEs because they must in order to win contracts. For all major contracts the Department of Transportation sets DBE subcontracting "goals." If contractors want to win the bid, they better make sure that they agree to meet or exceed those goals. The contractor can usually build into the contract part of the increased costs and risks from hiring DBEs, and must assume the remainder. Due to Federal and State laws, contractors must generally complete 50 percent or more of a contract using their own companies instead of subcontractors. Also, generally 30 percent of costs are for supplies, such as gravel or sand. Many parts of highway construction are very capital-intensive; emerging businesses, including DBEs, do not have the equipment (or the bonding, or the insurance, or the expertise) for those parts of construction. Prime contractors thus hire subcontractors almost exclusively for low-capital type work, such as traffic control. They are also allowed to fill part of their DBE quotas by buying from DBE suppliers. In many instances, these suppliers are just brokers who act as middlemen between supply companies and construction companies. On average, 50 percent of all Federal highway construction subcontracting goes to DBE firms to meet contract quotas. Supposedly the goal of the DBE program is to build participating companies up to a sufficient size that they "graduate" from the program and then compete for contracts outside of the quota system. However, almost no efforts are made to help these companies gain the experience they need to be able to compete on their own. A GAO study of the program found that almost no funds were spent on business development efforts, and many States did not even have business development programs. That same study found that while DBEs are continually forming and going out of business, very few ever graduate; over 4 years, it found an annual graduation rate of less than one-fourth of 1 percent. There is no time limit on participation; many firms have been in the program since its inception, and the same firms, over and over, tend to win the DBE subcontracts.

We urge our colleagues to look at what we have described. If, as they assume, all or most non-DBE contractors are white males, then they have created a program that gives white male contractors all of the more highly skilled and capital intensive jobs, on the condition that they hire a wildly disproportionate share of minority-owned firms for subcontracts for the less skilled, less capital intensive jobs. White male contractors who compete for those type of jobs, such as the guardrail contractor who brought the *Adarand* suit, are regularly discriminated against. They submit subcontracting bids that are often 10 percent or more lower than competing bids, but they lose because the prime contractors must fulfill their minority quotas. Minority-owned and women-owned firms comprise a small percentage of the total construction market, but the DBE program ends up giving them 50 percent or more of the subcontracting highway construction market. No effort is made to build up these companies, or even to make them more competitive for the type of work that they do. They get their jobs based on their race or gender.

The Department of Transportation, and our colleagues, measure the success of the DBE program by whether States meet their quotas. No attempt is made to find out if the minuscule number of graduating firms continue to get jobs; no attempt is made to find out if the DBE subcontractors win their bids because they have the proper business qualifications. Our colleagues assume that because the work gets done and the quotas are filled everything is working. They then look at State and local governments that have had quota programs and have abandoned them by choice or court order, and they see a sharp drop-off in minority contracting. Their conclusion, without further examination, is that those State and local governments are now discriminating. What they fail to notice is that those State and local governments are no longer able to hire those firms because they cannot compete. They have never learned how to prequalify or to get insurance, bonding, or credit, and they never learned normal business accounting practices or specific requirements for government contracting. They had been hired by prime contractors based on their race to meet quotas. The jobs got done because the prime contractors were legally responsible for making sure that they were done. If there were problems, the prime contractor had to pay to resolve them.

In many ways this debate is similar to the debate on welfare. For many years, we Republicans were unjustly castigated for being uncaring and even prejudiced because we dared to suggest that welfare was harmful to the people that it was supposedly helping. We persisted, though, and a true welfare reform bill was finally passed last Congress. That bill is replacing welfare with work. The fight to replace quota programs with constitutional affirmative action programs may prove equally difficult, and we Republicans will no doubt again be unjustly characterized. Our efforts, from welfare reform, to the Reform Alliance's current proposals for rebuilding the inner cities, to affirmative action reform, will never be popular with the liberal media, but they work. We know we are not going to win on this vote today. Too many Senators are fearful of being labelled "anti-woman" or "anti-minority." Eventually, though, we will win this debate. When we do, we will be one step closer to stopping discrimination in America.